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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

NO. 363

UNITED STATES OF AMERICA AND
FEDERAL COMMUNICATIONS COMMISSION, *PETITIONERS*,

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP., *RESPONDENTS*.

NO. 428

MIDWEST TELEVISION, INC., SAN DIEGO TELECASTERS, INC., AND JACK O. GROSS, *PETITIONERS*,

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV., INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP., *RESPONDENTS*.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

The All-Channel Television Society (ACTS) moves for leave to file a brief as *amicus curiae* in these cases. The consent

of the attorneys for the petitioners in both cases has been granted. The consent of the attorneys for respondents has been requested but refused.

ACTS is a national association representing the interests of present and potential television broadcast stations which do or will operate on ultra high frequency (UHF) channels. The success, and in many cases the survival, of UHF stations is dependent upon the Federal Communications Commission's regulation of community antenna television (CATV). The FCC's power to undertake the regulation is the central issue in the present cases. Consequently, ACTS and its members have a critical interest in their outcome.[1]

To uphold the Commission's CATV regulations the Court must find that (1) CATV is within the scope of the Communications Act of 1934 and (2) the regulations adopted are authorized by that Act. The first finding depends on whether CATV systems are "persons engaged" in interstate "communication by wire or radio." Communications Act § 2(a), 47 U.S.C. § 152(a). It seems clear that CATV is embraced within this definition, but in any event ACTS does not propose to argue the point.

The second finding depends on whether the Commission's CATV rules are within the contemplation of its delegated powers to "establish areas or zones to be served by any station"; to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each"; and to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act."

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[1] ACTS was formed in April, 1967, but did not begin to function effectively until June, 1967. For this reason ACTS did not seek to submit an *amicus* brief in the court below.

Communications Act of 1934, §§ 303(h), 303(r), 307(b), 47 U.S.C. §§ 303(h), 303(r), 307(b); see also *Id.*, § 4(i), 47 U.S.C. § 154(i). And whether the CATV rules are within the contemplation of these powers depends in turn on the impact of the regulated CATV activities on other matters concededly within the Commission's responsibility.

Petitioners in their briefs in the court below and in their certiorari papers have addressed this latter question but in the context of legal arguments showing that the CATV rules are within the contemplation of the powers delegated to the Commission by the statute. ACTS can contribute to the Court's resolution of the issues by focusing particularly on the impact of the regulated CATV activities on the television structure being fostered by the Commission under Congressional directives. In particular, it is in a position to show the impact of the regulated CATV activities on development of UHF broadcast stations. And this is of particular pertinence because the primary purpose of the Commission's CATV rules is to protect the public interest in the establishment and healthy maintenance of UHF broadcast services.

For these reasons ACTS believes that its *amicus* brief will aid the Court in the disposition of these cases and respectfully requests that leave to submit its brief be granted.

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BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The All-Channel Television Society (ACTS) is a national association representing the interests of present and potential television broadcast stations which do or will operate on ultra high frequency (UHF) channels. The success, and in many cases, the survival of UHF stations is dependent upon the Federal Communications Commission's regulation of community antenna television (CATV). The FCC's power to undertake the regulation is the central issue in the present cases. Consequently, ACTS and its members have a critical interest in their outcome.

ARGUMENT

The questions presented by these cases—whether the Commission has authority to regulate CATV television signal carriage and whether its authority encompasses a temporary stay of CATV expansion pending a full Commission hearing on the consequences—must be resolved in the affirmative once two points are established: (1) CATV systems are engaged in "interstate communications by wire or radio" when they carry the signals of FCC-licensed television stations and (2) FCC regulation is necessary to foster a television system based on the maximum number of local television outlets (stations), which the FCC has been endeavoring to establish in furtherance of its statutory responsibilities to "establish areas or zones to be served by any station", and to "make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each."[1] The

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[1] Communications Act of 1934, §§ 303(h), 307(b); 47 U.S.C., §§303(h), 307(b).

Communications Act grants the Commission power to make rules and regulations as may be necessary to carry out its statutory responsibilities.[2]

ACTS does not propose to address the first point for presumably it will be dealt with adequately in petitioners' briefs. With regard to the second point ACTS will show that (1) in the exercise of its delegated powers the FCC, under Congressional guidance, has established the goal of a television broadcasting system based on a maximum number of television broadcast stations as outlets for local self-expression and as sources for maximum program diversity, an objective that can be achieved only by full use of the UHF portion of the broadcast spectrum, and (2) the Commission's CATV rules are vitally necessary to preserve the opportunity for full utilization of the UHF band, which would be gravely threatened by the unregulated expansion of CATV activities.

I. THE NATIONAL POLICY FAVORING DEVELOPMENT OF A TELEVISION SYSTEM BASED ON THE MAXIMUM NUMBER OF LOCAL TELEVISION STATIONS

The existing television structure of intermixed VHF and UHF stations dates back to 1952 when the Commission, following a lengthy rule-making proceeding, adopted its basic table of television channel assignments. Acting pursuant to the Congressional directive to effectuate a "fair, efficient, and equitable distribution of radio service" to each of the several states and communities (Communications Act of 1934, § 307(b), 47

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[2] Communications Act of 1934, §§4(i), 303(r); 47 U.S.C., §§154(i), 303(r).

U.S.C. § 307(b)), the Commission assigned television channels to over 1250 communities. It rejected the notion (popularly known as the DuMont plan) to assign most channels for use in the major cities which would house super-stations serving large regions, holding instead that "as many communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs." *Sixth Report and Order in Dockets 8736, et al.*, 17 Fed. Reg. 3905, 3912, 3913 (May 2, 1952).

In order to achieve the objective of maximizing local outlets and program diversity, the Commission assigned channels in the UHF band as well as those in the VHF band. However, in the succeeding years, development of stations in the UHF band was sporadic and many UHF stations failed. The principal problem was that most television receivers were not equipped to receive UHF broadcasts. Manufacturers were not induced to construct all-band receivers in large volume because the demand for sets capable of receiving UHF broadcasts was not sufficiently widespread. On the other hand, UHF stations could not develop and create a demand for their broadcasts until their signals could be received by a substantial number of people. To break this vicious circle the Congress, acting on the Commission's recommendation, enacted the All-Channel Receiver Law in 1962 (76 Stat. 150, 47 U.S.C. §§303(a), 330). Pursuant to this statute all television receivers manufactured after April 30, 1964, are required to be capable of UHF as well as VHF reception. As a consequence the increase in the percentage of homes in the country capable of receiving UHF broadcasts has been and will continue to be dramatic.[3]

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[3] The Census Bureau publishes statistics periodically that show that the percentage of homes in the country able to receive UHF broadcasts has increased from 22.8 percent in August 1965 to 33.8 percent in August 1966 to 42.1 percent by June 1967.

However, the Congress recognized that the results sought to be achieved by the All-Channel Receiver Law would not be reached overnight. It was imposing a long-range solution to a difficult problem and it recognized that it might be a number of years before the statute had its full effect and most of the homes in the country were able to receive UHF broadcasts. H. Rep. No. 1559, 87th Cong., 2d Sess., pp. 5, 6, 7.

The All-Channel Receiver Law constituted a Congressional reaffirmation of the policy enunciated in the Communications Act of 1934 and applied by the Commission in the *Sixth Report and Order* in 1952 that the broadcast system should be based on the maximum number of local outlets. Thus, the report of the House Committee on Interstate and Foreign Commerce stated that the goal is

> "a commercial television system which will (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression."[4]

The Congressional and Commission objective of building the Nation's television system on the maximum number of local television broadcast outlets is soundly grounded in consideration of public policy. A television station within the community or neighboring area can provide a range of service impossible for distant stations. It furnishes accounts of news and events in

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[4] H. Rep. No. [illegible], 87th Cong., 2d Sess., p. 3.

the area and is heavily relied upon for this function.[5] It reports on political and governmental activity and provides a forum for public airing of local issues. In rural communities, agricultural information programs are standard fixtures.[6] Local stations afford local businessmen access to television advertising they can afford, which is particularly significant if their competitors are national concerns that advertise on television. A local station also is the source of local educational, religious, cultural and sports programs and is an outlet for local talent and local entertainment tastes.[7]

In an era of increasingly centralized communications of which newspaper mergers are merely one example, fostering of local television broadcast service is but one of several ways in which the FCC promotes diversification in public sources of opinion and entertainment. This Court has upheld the FCC in other manifestations of this objective. See *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (upholding rules limiting multiple ownership of stations); *National Broadcasting Co. v. United States*, 319 U.S. 190 (upholding regulations limiting network control of local station program responsibility).[8]

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[5] See Wood, Electronic Journalism 1-9; Roper, The Public's View of Television and Other Media, 1959-1964 (March 15, 1965).

[6] Over forty states have television stations regularly scheduling farm programs. Standard Rate & Data Service, Spot Television Rates and Data.

[7] The percentages of local programming devoted to various categories in March 1967 were as follows: News: 40.9 percent; Sports: 7.2 percent; Entertainment: 21.7 percent; Public Affairs: 7.9 percent; Religious: 6.9 percent; Agricultural: 5.1 percent; Instructional: 7.1 percent; Other: 3.2 percent. Television, Aug. 8, 1967, p. 36.

[8] Local stations are important employers. As of December 31, 1966, the 608 local commercial television stations employed over 39,000 persons. FCC Television and Broadcast Financial Data – 1966, Table 11.

The objective of maximum utilization of the broadcast spectrum for local television outlets can only be met through full use of the UHF portion of the broadcast band. In its report on the All-Channel Receiver legislation in 1962 the Senate Commerce Committee stated "the opportunity for local outlets which would be available for local programming and local self-expression is severely restricted in many of the markets because of the limited number of stations that are available. . ."[9] Similarly, the House report stated that the 12 VHF channels alone were "entirely inadequate for the Nation's needs" and that the development of UHF "is not only the best but the only practical way of achieving an adequate commercial and educational television system in the United States."[10]

Now that the All-Channel Receiver Law has taken effect and the principal obstacle to UHF development is being eroded (as more homes acquire sets equipped for UHF reception), UHF broadcasting is beginning to realize its potential. As of December 4, 1967, 135 UHF stations were in operation and 170 stations under construction but not yet on the air. Also, as of December 4, 1967, there were pending before the Commission an additional 96 UHF station applications.[11]

As the Commission stated in its *Second Report and Order* (A. 47), "there is every present indication that the all-channel set requirement is having its desired effect, with greatly increased interest in UHF, particularly in the many applications filed for

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[9] S. Rep. 1526, 87th Cong., 2d Sess., p. 4.

[10] H. Rep. 1559, 87th Cong., 2d Sess., pp. 4-5.

[11] Based upon Commission records, the number of UHF stations, both commercial and educational, on the air on January 1 is as follows: 1967 – 174; 1966 – 148; 1965 – 129; 1964 – 120; 1963 – 113.

the larger cities." If this momentum continues there is every reason to be optimistic that the Commission's objective of thousands of television stations, mostly UHF stations, in many hundreds of communities throughout the country can be achieved.

Full development of UHF is also necessary to achieve an effective nationwide educational television system. Most of the several hundred channels reserved for educational television are in the UHF band (see 47 CFR, § 73.606(b)) and, as the House Committee stated, educational television's "future and expansion will largely depend on the successful development of UHF broadcasting."[12]

In addition, full development of UHF commercial stations promises a widening of sources of national programs now largely supplied by three major national networks. One possibility is that successful establishment of UHF stations will lead to a "fourth national network or the formation of 'FM-type networks' in television." *Second Report and Order* (A. 46). These might include regional or specialized networks providing programming of interest to large regional areas or to minority groups, for example, that is not now available through national sources.

This brief sketch demonstrates the vital importance of UHF stations to the full achievement of our national television goals. It is because certain aspects of CATV profoundly threaten the achievement of these goals that the Commission has exercised its jurisdiction over CATV to regulate these activities. In the next section we turn to the Commission's regulations and show how they are designed to preserve the opportunity for UHF development.

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[12] H. Rep. 1559, 87th Cong., 2d Sess., p. 4.

II. THE COMMISSION'S REGULATION OF CATV IS VITAL TO THE SUCCESS OF UHF TELEVISION

We have shown that the statutory objective of a fair, efficient and equitable distribution of radio service to each of the several states and communities, which the Commission has construed, with Congressional approval, as requiring the maximum number of local television outlets, can only be met by full utilization of the UHF portion of the broadcast spectrum. To advance this objective the Commission, in the exercise of its delegated powers, including its powers to "establish areas or zones to be served by any station" and to "make such rules and regulations . . . as may be necessary to carry out the provisions of this Act" particularly Section 307(b) [13] has adopted regulations applicable to certain CATV activities. We show below that these regulations are indispensable to maintenance of the service areas of television stations established by the Commission and to achievement of the overall statutory objectives.

CATV is the use of complex electronic systems to gather television signals and feed them by wire into subscribing homes. CATV systems originated to provide television service to communities which, because of mountainous terrain or other obstacles, or because of their distance from television stations, were unable to receive television signals "off-the-air" through normal home reception devices. In this respect CATV has provided and continues to provide a valuable service to its subscribers supplementary to the basic off-the-air broadcast services available to the public at large.

In the past several years, however, a new CATV trend has developed that is quite distinct from the original CATV function.

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[13] 47 U.S.C. Section 307(b).

It involves the construction of multiple-channel systems in the larger cities and communities for the purpose of importing television signals from distant stations that do not and were not intended to serve the CATV community "off-the-air." Typically, the new CATV communities already enjoy substantial service from local stations and in many communities UHF stations have recently begun to operate or are preparing to commence operations. Thus, CATV systems are either already in operation or are planned for such metropolitan areas as Philadelphia, which has three UHF stations in operation and one UHF station planned for the future, Cleveland, which has two UHF stations under construction and applications pending for a third station and Washington, D.C., which has two UHF stations in operation and one planned for the future.

In its *Second Report and Order,* the Commission took note of "the changing nature of the CATV operation" (A. 47), pinpointing three developments: first, channel capacity of the systems has increased from an average of three in 1959 to twelve at the time of the report and twenty or more for the future; second, signals are being carried over greater distances—up to several hundred miles;[14] and "finally, the CATV industry has shifted its attention to the larger communities . . ." (A. 47-48).

This new CATV trend poses a great threat to the establishment and maintenance of local television stations, particularly UHF stations, the continued operation of which hangs in

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[14] CATV systems are becoming able to receive television signals originating great distances from the communities in which the systems operate through the use of sophisticated receiving antennae without the necessity of utilizing microwave facilities. These antennae devices cost up to $100,000 and, obviously, are not available to the general public.

delicate balance and which will continue to struggle for economic viability until the All-Channel Receiver Law[15] becomes fully effective.

The threat takes several forms. First, a CATV system can deprive a local station of access to its audience by not carrying it. Typically, home owners disconnect and sometimes remove altogether outside antennae when television sets are connected to CATV. *First Report and Order,* 38 FCC 683, 702, n. 25. Thus, if the CATV system fails to carry a local station, the local station is deprived of a fair opportunity to compete for an audience among the subscribers to the CATV system. And the inevitable reduction in the local station's audience causes a corresponding loss in the advertising revenues the station needs to survive, since it is an economic fact that the revenues of a television station are directly related to the audience the station obtains for its programs. To meet this threat, the FCC adopted "carriage" rules that require CATV systems to carry local stations and not to degrade their signals.

Second, CATV can dilute a local station's audience by carrying distant stations whose programs duplicate those of the local stations, thereby causing a reduction in the local station's audience through fractionalization. Such fractionalization is most apparent when a CATV system carries distant network affiliated stations which broadcast at the same time the same network programs broadcast by the local stations. The duplication does not, of course, extend the choice of programs available to the CATV system subscribers; it merely permits the subscribers to view the same programs on several different channels rather than only on the channel on which the local station broadcasts.

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[15] 47 U.S.C. 330.

For example, there are 33 operating CATV systems in the Wilkes-Barre–Scranton, Pennsylvania area which serve a total of 95,447 homes. All of these systems carry the NBC network programs broadcast by UHF Station, WBRE-TV which is licensed to serve the Wilkes-Barre–Scranton area, but almost all the systems also carry the NBC network programming broadcast at the same time by VHF Station KYW-TV, Philadelphia, which is located from 75 to 100 miles from the great majority of the CATV systems. Absent carriage on the CATV systems, the programs of Station KYW-TV would not be received by the vast majority of the CATV systems' subscribers, because of the distance from Philadelphia and the nature of the terrain in the area. But because of the carriage by the CATV systems of the NBC network programs broadcast by Station KYW-TV, the audience among the systems' subscribers for NBC programs is divided between Station WBRE-TV and KYW-TV. As a consequence, at least one national audience rating service has reported that in three counties outside the KYW-TV normal service area and well within the WBRE-TV service area, KYW-TV is viewed more than Station WBRE-TV. As a matter of fact, because of the KYW-TV audience among the CATV subscribers in those three counties, the rating service considers the counties to be a part of the Philadelphia television market rather than Wilkes-Barre–Scranton television market. The loss of these counties to the Philadelphia television market directly results in a loss of revenues to Station WBRE-TV since advertisers desiring exposure in the three counties in question will place their announcements on Station KYW-TV and not Station WBRE-TV.

To meet the second threat to the establishment and healthy maintenance of local television stations, the Commission requires that CATV systems, upon request by the local station, not duplicate any programs on the same day of broadcast by the local station.

Third, the carriage of numerous distant stations fragments the audience of the local stations, notwithstanding the operation of the non-duplication rule. Since that rule applies only to programs duplicated on the same day as their broadcast by the local stations, it does not cover most, if not all, the non-network programming of the distant stations carried on the CATV systems—a substantial percentage of the total number of programs broadcast by distant stations affiliated with one of the three national networks and practically all the programs broadcast by "independent" stations. Oftentimes, and particularly where the CATV system carries stations from a larger city, these programs consist of movies and syndicated films that will also be broadcast by the local stations at a later date.[16] But since the programs are carried on the CATV system first, the local stations obtain a smaller audience for them, since every showing of a program reduces its audience potential for subsequent showings. And the audience diminution resulting from the prior showing of the programs on the CATV system can in turn prevent the local stations from deriving sufficient advertising revenue to cover the cost of the programs.[17]

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[16] The distributors of television program fare establish the price of the programs according to the size of the market being served by the television station to which the program is offered. The larger the market, the higher the price of the program. Thus, as a matter of good business judgment, the distributors of television programming first offer their products to the television stations in the largest markets such as Los Angeles and New York City. This process invariably results in the better syndicated programs and feature films being purchased and first broadcast by television stations in the larger cities.

[17] One particularly significant ancillary fact is that the revenue from non-local programs generally helps to sustain the local programming efforts of television stations, for local programming is often the most expensive to produce but has a narrower audience and, consequently, advertiser appeal.

The effects of prior CATV showing of the programs of a local station are, of course, most severe where the local station is not affiliated with one of the national networks, since such a station must rely almost entirely on syndicated and feature films for the revenues necessary to sustain its operations. Significantly, most "independent" stations now on the air and coming on the air are UHF.

Even where the programs of local stations are not directly duplicated the carriage of distant stations on a CATV system results in the dilution of a local station's audience since the local station is not only competing for audience with the other stations allocated to the community, but is also competing against however many distant stations the CATV system may choose to carry. In the absence of federal regulation, the CATV system's choice of the number of distant stations to be carried is typically dictated not by any considerations relating to the "fair, efficient, and equitable distribution" of television services,[18] but rather only by the limitations of CATV technology and the CATV system's private business concerns.

Independent stations, and particularly independent UHF stations, are the most vulnerable to the audience fragmentation caused by CATV for they have only a limited potential audience to start with. Almost without exception, during periods when the national networks are providing programs, the independents are able to attract only a relatively small percentage of viewers that are not interested in the programs of the national networks. And when a CATV system carries other independents from distant cities the local independent station's limited audience is further reduced and could be reduced below the minimum required for the station to continue operation. As the Commission found in its *Second Report and Order:*

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[18] 47 U.S.C. 307(b).

> ". . . The audience for non-network stations is limited (about a 10 percent share in most markets in the prime time) and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the non-network programming would be watching the distant independents (*e.g.*, those of New York or Los Angeles). We think this follows as a matter of common sense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive non-network programming." (A. 50)

The fragmentation threat to independent UHF stations is most immediate and could result in the demise of many of the stations now on the air, as well as the prevention of others from coming on the air. Many independent UHF stations have come on the air in the last few years and are struggling to attain commercial viability.[19] They are investing huge sums of money in equipment and programming, including local programming oriented to the particular program interests of their communities, and they have sustained substantial losses during this formative period. Widespread CATV importation of distant stations that would fragment the audiences of these new and young independent stations would certainly compound these losses and ultimately cripple or destroy most of them.

Thus, in Charlotte, North Carolina, more than one million dollars was invested in an independent UHF station, WCTU-TV, which went on the air in July, 1967. At that time, there was no CATV system in operation in the City of Charlotte and the CATV systems in operation elsewhere within the WCTU-TV service area did not carry other independent stations. Since

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[19] As shown at n. 3, *supra*, a substantial percentage of all television sets in use are still incapable of receiving UHF stations.

going on the air, WCTU-TV has been struggling to attain economic viability, as was expected. But it was also expected that the station ultimately could become viable since the share of the total television audience usually obtained by independent stations should be sufficient to attract the advertising support necessary to sustain the station's operations. However, if the CATV systems in operation throughout the station's service area—and this now includes a CATV system in the City of Charlotte itself—were to carry other independent stations, WCTU-TV's prospects for attaining economic viability would be doubtful at best since WCTU-TV would then have to obtain the revenues necessary to sustain its operation on the basis of a share of an already small share of the total television audience in the Charlotte market.[20]

The potential for harm in unrestricted CATV importation of signals is also graphically illustrated in a situation now developing in Philadelphia, Pennsylvania. Philadelphia presently is served by three network affiliated VHF television stations and three independent non-network affiliated UHF stations. Additionally, authorization for the construction of a fourth independent UHF television station in the market has been issued by the Commission.

The independent UHF stations now operating in the market have been on the air for over two years. The operation of the All-Channel Law, accelerated by the presence of the stations in the market, has resulted in the conversion of some 70% of the Philadelphia market to all-channel reception capability. Within recent months, the stations have evidenced strong audience acceptance in the market and indications of eventual economic viability and a healthy economic future.

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[20] Non-commercial educational television stations, most of which are or will be UHF stations, are also endangered by CATV extension of distant signals though in different ways. These stations do not sell advertising but rely very heavily upon local contributions and grants for operating revenues. These sources are likely to dry up should CATV import non-commercial stations from other cities. While the distant station normally cannot serve local needs, by tying directly into a school program for example, it would be extremely difficult to maintain local financial support for an educational station in the face of the availability of distant educational stations on the cable.

However, presently pending before the Commission are 30 proposals to import into the Philadelphia television market the signals of the three New York City independent VHF television stations which could result in the three New York City independent stations being brought into over 120 communities within the television market served by the Philadelphia independent UHF stations, including the City of Philadelphia. The impact of such massive importation of distant city independent signals upon the UHF stations in Philadelphia, particularly at this critical juncture in their development, will adversely and irreparably damage the development of effective independent local television service in the Philadelphia area.[21]

As a partial solution to the threat of independent UHF station development from the carriage of distant stations on CATV systems, the Commission adopted a regulation[22] requiring prior Commission authorization before any distant station is carried on a CATV system operated within the primary ("Grade A") service areas of stations in the 100 largest television markets. In view of the substantial threat to local broadcast service posed by CATV carriage of distant stations, the FCC's moderate regulations on the subject were clearly reasonable. Several parties urged the Commission to ban outright any CATV extension of television signals beyond their designated service areas.[23] The Commission's response was far less restrictive. It contained no outright bans. In the top 100 television markets it provided for evidentiary hearings on request of CATV systems to determine whether importation of distant signals to communities within the Grade A service areas of local stations was in the public

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[21] If the development and healthy maintenance of independent UHF television service can be threatened in Philadelphia, the fourth largest television market in the country, the threat to independent UHF service by CATV carriage of distant stations in the smaller markets is obviously more pronounced.

[22] 47 CFR 74.1107.

[23] For example, ACTS has urged the Commission to require an evidentiary hearing before the carriage on a CATV system of any distant television station, regardless of the size of the market in which the CATV system operates.

interest, such importation to be deferred pending the Commission's determination. In the outer portions of local stations' service areas in the top 100 markets, and anywhere in the remaining markets, CATV systems were free to import distant stations unless by special petition it was shown to the FCC that such importation posed a substantial threat to establishment and maintenance of off-the-air service, in which case the Commission reserved the power to stay the CATV importation until it could determine the public interest questions. Similarly, "grandfathered" systems (those in operation when the rules were adopted) were permitted to continue their carriage of distant stations but should they attempt to expand operations to new areas the Commission, on special petition of an interested party, reserved the right to consider the matter and to stay the expansion while doing so.

In certain cases, stays are automatic under the Rules. In others they are granted on an *ad hoc* basis. Either way, they are central to the regulatory scheme, for, if a CATV system is permitted to expand its service area or add new stations while the public interest questions presented by such CATV expansion are being considered in a lengthy administrative proceeding, the adverse consequences the proceeding is designed to prevent may well take place before the proceeding is completed. Moreover, where UHF stations are planned but not yet in operation, unchecked CATV expansion could deter, if not totally preclude, the inauguration of local service.

In sum, the Commission has properly found that the development and healthy maintenance of independent UHF television service would further the Congressional mandate that the Commission provide a "fair, efficient, and equitable distribution" of television service throughout the country.[24] Independent UHF television stations in the vast majority of areas in the country do and will provide an alternative to network programming—which constitutes more than 60% of the programming of network-affiliated television stations—thereby making a substantial

[24] 47 U.S.C. 307(b).

contribution to the diversity of free television programming available to the public at large. Unregulated CATV operations, through the failure to carry the programs of local UHF stations, through the duplication of the local stations' programs and through the fractionalization of the local stations' audience by the carriage of multiple distant stations, pose a substantial threat to the Commission's goal and to the public interest.

In light of the Commission's delegated power to make rules defining "areas or zones to be served by any station," its obligation to so license stations as to provide a "fair, efficient and equitable distribution of radio services" to the states and their communities, and its power to make rules and regulations "necessary to carry out the provisions of this Act," the CATV rules here challenged by respondents seem not only consistent with but virtually compelled by the governing statutory authorizations.

A final word about the public interest consequences of destruction or impairment of local stations—particularly UHF stations, which would almost certainly follow if CATV were not regulated. CATV is a supplementary rather than primary television service for several important reasons. First, whereas off-the-air service is free to the public, the use of CATV requires payment of continuing monthly charges and often an installation fee, varying considerably from place to place but sometimes quite substantial.[25] Millions of Americans who now are served by free television simply cannot afford CATV or would have great difficulty in financing it. Thus, for these people destruction or impairment of off-the-air service means the demise or reduction of the only television service available to them.

Second, "because of the prohibitive costs of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals." *First Report and Order*, 38 FCC 683, 699. These are the outlying

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[25] Seiden, Economic Analysis of CATV Systems and the Television Broadcasting Industry, p. 27, calculated that "the average CATV subscriber pays $60 a year for CATV service, often in addition to an initial installation charge."

areas, particularly rural areas, and if local service ceases or its quality is diminished by virtue of CATV distant station importation into the heavily populated areas, the people in these outlying areas would have nothing to replace their lost service. Often in these areas because of their isolation television is the only or principal source of entertainment and news.

The next few years will be decisive for UHF broadcasting. As the FCC stated, "we are at the watershed in the development of UHF broadcasting" and with the "increased ferment in UHF, we believe the next few years will supply the critical answer to whether the Congressional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved." (A. 46, 47.) The Commission's Rules regulating CATV are an effort to prevent CATV from thwarting that goal and, as such, they are in the main stream of its statutory responsibilities.

CONCLUSION

For the foregoing reasons *Amicus Curiae* respectfully submits that the FCC's CATV rules are within its statutory power and that the contrary holding of the Court below should be reversed.

Respectfully submitted,

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